

**TITLE 14. Fish and Game Commission
Notice of Proposed Changes in Regulations**

NOTICE IS HEREBY GIVEN that the Fish and Game Commission (Commission), pursuant to the authority vested by Sections 2070 and 2075.5 of the Fish and Game Code and to implement, interpret or make specific Sections 1755, 2055, 2062, 2067, 2070, 2072.7, 2075.5 and 2077 of said Code, proposes to amend Section 670.5, Title 14, California Code of Regulations, relating to Xantus's murrelet.

Informative Digest/Policy Statement Overview

The Department of Fish and Game recommends that the Commission amend Section 670.5 of Title 14, CCR, to add Xantus's Murrelet (*Synthliboramphus hypoleucus*) to the list of threatened birds (Subsection (b)(5)). The Department's recommendation is based upon limited distribution and small population size, and the documentation of population declines and threats to the species, to the point that the Department believes the species meets the criteria for listing as threatened by the Fish and Game Commission as set forth in the California Endangered Species Act (CESA). The Department is fulfilling its statutory obligation in making this proposal which, if adopted, would afford this species the recognition and protection available to it under CESA. Xantus's Murrelet is rare in California, and restricted to six nesting islands in the Channel Islands of southern California. Population decline is ongoing at the largest colony on Santa Barbara Island based on National Park Service monitoring efforts.

NOTICE IS ALSO GIVEN that any person interested may present statements, orally or in writing, relevant to this action at a hearing to be held in San Diego, California on Wednesday, May 6, 2004, at 8:30 a.m., or as soon thereafter as the matter may be heard. Please call the Commission Office at (916) 653-4899 for the exact location of the meeting. At this time, Commission staff has not been able to confirm the exact location of the meeting. It is requested, but not required, that written comments be submitted on or before April 30, 2004, at the address given below, or by fax at (916) 653-5040, or by e-mail to FGC@dfg.ca.gov, but must be received no later than May 6, 2004, at the hearing in San Diego, CA. All written comments must include the true name and mailing address of the commentor.

The regulations as proposed in ~~strikeout~~-underline format, as well as an initial statement of reasons, including environmental considerations and all information upon which the proposal is based (rulemaking file), are on file and available for public review from the agency representative, Robert R. Treanor, Executive Director, Fish and Game Commission, 1416 Ninth Street, Box 944209, Sacramento, California 94244-2090, phone (916) 653-4899. Please direct inquiries to Robert R. Treanor or Tracy L. Reed at the preceding address or phone number, Ms. Esther Burkett, Department of Fish and Game, phone (916) 654-4273, has been designated to respond to questions on the substance of the proposed regulations. Copies of the Initial Statement of Reasons, including the regulatory language, may be obtained from the address above. Notice of

the proposed action shall be posted on the Fish and Game Commission website at <http://www.dfg.ca.gov>.

Availability of Modified Text

If the regulations adopted by the Commission differ from but are sufficiently related to the action proposed, they will be available to the public for at least 15 days prior to the date of adoption. Any person interested may obtain a copy of said regulations prior to the date of adoption by contacting the agency representative named herein.

If the regulatory proposal is adopted, the final statement of reasons may be obtained from the address above when it has been received from the agency program staff.

Impact of Regulatory Action

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following initial determinations relative to the required statutory categories have been made:

- (a) Significant Statewide Adverse Economic Impact Directly Affecting Business, including the Ability of California Businesses to Compete with Businesses in Other States:

While the statutes of the California Endangered Species Act (CESA) do not specifically prohibit the consideration of economic impact in determining if listing is warranted, the Attorney General's Office has consistently advised the Commission that it should not consider economic impact in making a finding on listing. This is founded in the concept that CESA was drafted in the image of the federal Endangered Species Act. The federal act specifically prohibits consideration of economic impact during the listing process.

CESA is basically a two-stage process. During the first stage, the Commission must make a finding on whether or not the petitioned action is warranted. By statute, once the Commission has made a finding that the petitioned action is warranted, it must initiate a rulemaking process to make a corresponding regulatory change. To accomplish this second stage, the Commission follows the statutes of the Administrative Procedure Act (APA).

The provisions of APA, specifically sections 11346.3 and 11346.5 of the Government Code, require an analysis of the economic impact of the proposed regulatory action. While Section 11346.3 requires an analysis of economic impact on businesses and private persons, it also contains a subdivision (a) which provides that agencies shall satisfy economic assessment requirements only to the extent that the requirements do not conflict with other state laws. In this regard, the provisions of CESA leading to a finding are in apparent conflict with Section 11346.3, which is activated by the rulemaking component of CESA.

Since the finding portion of CESA is silent to consideration of economic impact, it is possible that subdivision (a) of Section 11346.3 does not exclude the requirement for economic impact analysis. While the Commission does not believe this is the case, an abbreviated analysis of the likely economic impact of the proposed regulation change on businesses and private individuals is provided. The intent of this analysis is to provide disclosure, the basic premise of the APA process. The Commission believes that this analysis fully meets the intent and language of both statutory programs.

Designating Xantus's murrelet as threatened will subject the species to the provisions of CESA, including the prohibition on take except as may be permitted by the Department. The designation of Xantus's Murrelet as a threatened species under CESA is not expected to result in significant statewide adverse economic impacts directly affecting businesses, including the ability of California businesses to compete with businesses in other states, for the reasons discussed below.

Where the Department authorizes take of Xantus's murrelet that is incidental to an otherwise lawful activity, impacts of the taking must be minimized and fully mitigated, and any such mitigation must be monitored for effectiveness under CESA. Permitting under CESA for incidental take of Xantus's murrelet will result in increased cost when compared to the status quo, but these costs are not expected to be significant statewide adverse economic impacts because of the limited range of the species within California.

Designating the Xantus's murrelet as a threatened species could also result in increased mitigation costs under CEQA to public agencies, businesses and other persons in California. These increased costs are also not expected to be significant and adverse on a statewide basis given the limited range of the species within California. Likewise, these increased costs are not expected to be significant and adverse on a statewide basis because the rarity of the species may already subject projects with the potential for significant adverse impacts on the species or its habitat to heightened scrutiny and related mitigation obligations under CEQA (CEQA Guidelines, Sections 15065, 15380).

Project costs as a result of CEQA and CESA may include, but are not limited to protection and purchase of off-site habitat, development and implementation of management plans, establishment of new populations, predator management, establishing a nest box program, protection of additional habitat, and long-term monitoring. Even with these potential costs, the Department may identify innovative ways to avoid potential take of murrelets, such as through educational efforts, proper signing of nesting areas, and letter agreements with various public agency and private sector stakeholder groups. These efforts may eliminate the need for mitigation measures and their associated costs, at least in some instances.

A potential economic benefit of listing for the local economy and the Department could result from viewing and interpretation activities involving Threatened and Endangered wildlife. Persons interested in such activities would spend money in local communities for food, lodging, equipment, and transportation. The murrelet could be included in wildlife interpretation programs and thus contribute to public education about Threatened and Endangered species. Increased public education could result in increased contributions to the State's Rare and Endangered Species Tax Check-off program, which would in turn provide further funding for management and recovery activities for all listed species. Private tour operators could also potentially benefit economically from increased tourism, interpretation, and educational activities.

Additionally, private biological consulting firms could benefit economically from assisting in the development and implementation of mitigation measures. Such firms specialize in acting as a liaison between the Department and permit applicants.

- (b) Impact on the Creation or Elimination of Jobs within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California:

Designating the Xantus's murrelet as a threatened species under CESA is not expected to result in a significant impact on the creation or elimination of jobs within the State, the creation of new businesses or the elimination of existing businesses, or the expansion of businesses in California. In contrast, listing the species as threatened under CESA could result in economic impacts to certain businesses in and around documented nesting and foraging habitat for the species, including the Channel Islands. These businesses include the commercial squid fishery, other sport and recreational fisheries, and commercial recreational businesses engaged in, for example, sea kayak tours and sport diving. Economic impacts to these businesses could result from permitting costs under CESA where incidental take authorization from the Department is requested. Because it is unclear whether or the extent to which these commercial activities result in take of Xantus's murrelet as defined by State law, permitting related costs are also difficult to estimate at this time.

As was noted in the section above (VI)(a), there may be offsetting costs that balance out in the long run, resulting in no net significant adverse economic impacts on jobs or businesses from listing the murrelet as threatened (see also section VI d, below). Maintenance of sustainable fisheries and an ecologically balanced natural environment, and maintenance of recreational/tourism activities in the Channel Islands area where the murrelets nest will help assure economic vitality and a diversity of jobs in the State over the long term.

- (c) Cost Impacts on a Representative Private Person or Business:

Designation of threatened or endangered status, per se, would not necessarily result in any significant cost to private persons or entities undertaking activities subject to CEQA. CEQA presently requires private applicants undertaking projects subject to CEQA to consider *de facto* endangered (or threatened) and rare species to be subject to the same protections under CEQA as though they are already listed by the Commission in Section 670.2 or 670.5 of Title 14, CCR (CEQA Guidelines Section 15380).

Any added costs should be more than offset by savings that would be realized through the information consultation process available to private applicants under CESA. The process would allow conflicts to be resolved at an early stage in project planning and development, thereby avoiding conflicts later in the CEQA review process, which would be more costly and difficult to resolve.

Actual cost impacts are difficult to determine since the Department has not fully evaluated innovative ways to inform and educate all entities in the Channel Islands area with the potential to take murrelets. If extensive public outreach is undertaken to a variety of user groups (including sport divers, sea kayakers, hikers, market squid fishermen, etc.), take of murrelets can be avoided or minimized, and the need for mitigation measures and their associated costs can also be reduced. The Department can also utilize the educational outreach abilities of other entities such as private conservation organizations and federal land management agencies to help inform the public of actions they can implement to minimize take of murrelets. Significant cost impacts on representative private persons or businesses are not expected as a result.

- (d) Costs or Savings to State Agencies or Costs/Savings in Federal funding to the State: None.
- (e) Nondiscretionary Costs/Savings to Local Agencies: None.
- (f) Programs Mandated on Local Agencies or School Districts: None.
- (g) Costs Imposed on any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4: None.
- (h) Effect on Housing Costs: None.

Effect on Small Business

It has been determined that the adoption of these regulations may affect small business.

Consideration of Alternatives

The Commission must determine that no reasonable alternative considered by the Commission, or that has otherwise been identified and brought to the attention of the Commission, would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

FISH AND GAME COMMISSION

Dated: February 24, 2004

Robert R. Treanor
Executive Director